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No. 02-1672

IN THE
Supreme Court of the United States

October Term, 2004

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND 31 OTHER ORGANIZATIONS AND INDIVIDUALS* IN SUPPORT OF PETITIONER

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American Association of University Women
AAUW Legal Advocacy Fund
American Medical Women's Association
Business and Professional Women/USA
California Women's Law Center
Coalition of Labor Union Women
Connecticut Women's Education and Legal Fund
Equal Rights Advocates
Girls Incorporated
Hadassah
League of Women Voters
Legal Momentum
National Asian Pacific American Women's Forum
National Association of Social Workers
National Association of Women Lawyers
National Association of Working Women (9to5)
National Council of Jewish Women
National Organization for Women Foundation
National Partnership for Women & Families
National PTA
Northwest Women's Law Center
Wider Opportunities for Women
Women's Business Development Center
Women Employed
Women's Law Center of Maryland, Inc.
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AMICUS CURIAE BRIEF OF NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, ET AL.

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations and individuals dedicated to the achievement of equality of opportunity for

women and girls in education.[1] A number of the *amici* were instrumental in supporting the enactment of Title IX in 1972 and have been working to realize its goals for over thirty years. *Amici* have a vital interest in effectuating Title IX's original intent of broad and effective protection against gender discrimination in education, and thus in ensuring that the individuals who bring discriminatory practices to light are protected from retaliation and reprisal. Statements of the individual interests of the *amici curiae* are included in an Appendix to this brief.

SUMMARY OF ARGUMENT

Although much progress has been made in achieving Title IX's goal of promoting equal opportunity in education without regard to gender, thirty-two years after its enactment that objective is still far from realized. Women continue to be underrepresented in traditionally male educational programs that are most likely to lead to higher earning power upon graduation. Women are underrepresented in the faculties of colleges and universities, are more likely to be in the lower faculty ranks, are less likely to be tenured, and on average earn less than their male counterparts. Young women are offered fewer opportunities to play sports and receive less funding and fewer scholarships when they do. Girls and women remain all too likely to experience sexual harassment in schools. Because women in educational institutions are less likely to be in positions of power and authority than men, they are more susceptible to retaliatory action.

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[1] Letters from petitioner and respondents indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

Protection from retaliation is a necessary component of Title IX. Retaliation is not only a form of discrimination itself, it also intensifies and prolongs the harm to those who already have suffered discrimination, and deters and discourages those who witness and would report such practices. Moreover, retaliation promotes discrimination by impeding informal resolution of violations and by sending the message that inequities are tolerated, but speaking up is not. In the context of sexual harassment claims, in which the institution must have actual knowledge of the violation before monetary damages may be assessed, it would be particularly unfair to leave the victim of harassment open to retaliation for notifying the institution of the harassment.

In order to continue the progress towards Title IX's promise of equal educational opportunity, those individuals who experience or witness discrimination must remain free from retaliation so they can report what they see, express their concerns, and register their complaints. If the fear of retaliation makes individuals unable or unwilling to take these steps, gender inequities in education will not only persist, but may even worsen. To accept retaliation is to accept, even invite, inequality. Title IX, properly construed, must protect those individuals who bring violations of the statute to light.

ARGUMENT

I. DISCRIMINATION, INCLUDING RETALIATION AGAINST THOSE WHO REPORT IT, PERSISTS IN EDUCATIONAL INSTITUTIONS.

With the passage of Title IX of the Education Amendments Act of 1972 ("Title IX"), Congress broadly promised that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The statute has been accorded "a sweep as broad as its language," *North Haven Bd.*

of Educ. v. Bell, 456 U.S. 512, 521 (1982) (internal citation omitted), promoting equality of opportunity without regard to gender in every aspect of educational life, including admissions, recruitment, financial aid, academic programs, student treatment and services, vocational education, physical education and athletics, and employment. The "sweep" of the statute would be grievously curtailed if those who experience discrimination, usually women, have no protection from reprisal for reporting it.

A. While There Has Been Significant Progress In The Last Thirty Years, The Full Scope Of Title IX's Guarantees Are Far From Realized.

Today, thirty-two years after its enactment, Title IX has given millions of girls and women the chance to attend and graduate from college, play sports, and enter professions—experiences and opportunities that were largely denied to their mothers and grandmothers. In the 2001-02 academic year, for example, women earned 46 percent of all doctoral degrees, up from 14 percent in 1970-71.[2] That same year, women earned 46 percent of degrees in law, medicine, and dentistry, compared to 7 percent in 1970-71.[3]

Also noteworthy is the impact that Title IX has had on making student athletics more open to girls and women. In 1971, the year before Title IX became law, fewer than 300,000 girls participated in high school sports, making up less than seven percent of all high school varsity athletes. Now, the number approaches three million, with women making up nearly 42 percent of all high school varsity athletes. The number of women participating in intercollegiate sports in that same time span has gone from fewer than 30,000 to more than 150,000. Funding for women's teams has also substantially increased.[4]

And yet, these significant strides cannot mask that Title IX's full promise of equality of opportunity is still far from being realized. Among the more significant areas of concern:

Higher Education in Science and Engineering

- Men outnumber women in nearly every field in the sciences. In 1960, women made up less than three percent of all scientists. In 2003, they still constitute less than 20 percent of all scientists. With the exception of life sciences, women continue to earn fewer degrees than men in the sciences at all levels—bachelors, masters, and doctorates.[5]

- Women continue to be underrepresented in traditionally male fields that lead to greater earning power upon graduation. Undergraduate data from 2001-2002 show that women earned only 28 percent of the

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[2] U.S. Department of Education, National Center for Education Statistics, *The Condition of Education* 2004 (NCES 2004-077), Indicator 20 ("Degrees Earned By Women"), available at http://www.nces.ed.gov/programs/coe/2004/section3/indicator20.asp [hereinafter NCES, Indicator 20].

[3] NCES, Digest of Education Statistics, Table 259 (June 2003), available at http://www.nces.ed.gov/pubs2003/2003060.pdf.

[4] National Coalition for Women and Girls in Education, *Report Card on Gender Equity*, at 14-16 (June 2002), available at http://www.ncwge.org/title9at30-6-11.pdf [hereinafter Report Card on Gender Equity].

[5] General Accounting Office, Gender Issues: Women's Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX, GAO-04-639, at 14-17 (July 22, 2004) [hereinafter GAO Report].

bachelor's degrees in computer and information sciences and only 21 percent of the engineering degrees. In computer and information sciences, there was actually a downward trend. The number of women receiving such bachelor's degrees decreased by more than eight percent from 1984-85 to 2001-02.[6]

- Sex segregation by academic concentration is even more acute in graduate degree programs. In 2001-02, fewer than one out of every three doctoral degrees in mathematics (29 percent), physical sciences (28 percent), computer and information sciences (23 percent), and engineering (17 percent) were awarded to women.[7]

Athletics

- In 2001, girls represented 41.5 percent of participants in high school varsity athletics.[8] Although there were 2.8 million girls playing high school sports in 2002, 4 million boys participated in high school sports teams.[9]

- With respect to college athletes, only 41 percent of participants in varsity athletics are women, and women received just 43 percent of

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6 NCES, Indicator 20 & tbl. 20-1.

7 NCES, Indicator 20, tbl. 20-2.

8 Report Card on Gender Equity at 15.

9 National Association of State Boards of Education, Policy Update: *Title IX After Thirty Years* (May 2003), available at http://www.nasbe.org/Membership/Educational_Issues/Policy_Update/11_8.pdf.

the athletic scholarships. Sixty-four percent of operating budgets are devoted to men's sports, with only 32 percent devoted to women's sports.[10]

- In the 2001-02 school year, female head coaches led 44 percent of women's intercollegiate athletic teams, the lowest total since the passage of Title IX, and down from 90 percent in the early 1970s. Since 2000, 90 percent of the available head coaching positions in women's athletics have gone to men. At the same time, the percentage of women coaching men's teams has remained consistent for 30 years, at two percent.[11]

Career Education

- Sex segregation persists in vocational education. Male students predominate in high-skill, high-wage career tracks that train them to be plumbers, electricians, welders, carpenters, and mechanics. Female students by comparison are clustered in the low-skilled, low-wage tracks training for jobs in cosmetology, child care, and health.[12]

- This sex segregation has a serious adverse impact on girls' and women's economic

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10 U.S. Department of Education, The Secretary of Education's Commission on Opportunity in Athletics, *Open to All: Title IX at Thirty*, at 19 (Feb. 28 2003), available at http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf (citing NCAA Gender Equity Survey (2001)).

11 Report Card on Gender Equity at 16-17.

12 *Id.* at 24.

prospects. In 2000, women made up 91 percent of teachers aides, 90 percent of nurses aides, and 91 percent of hairdressers, earning a mean annual salary of $18,770, $19,100, and $20,710 respectively. Women who were able to receive training for nontraditional jobs such as carpenters, plumbers, and electricians meanwhile earned a mean annual salary of $35,100, $40,170, and $42,210 respectively.[13]

Employment

- As of 1998-99, women made up less than 37 percent of faculty members in colleges and universities. The number of women is highest at two-year public colleges, in which women make up 49.9 percent of full-time instructional faculty members and staff, and lowest at private, four-year colleges and universities with significant research facilities, in which women are only 26.2 percent of the faculty.[14]

- Even in fields in which women earn most of the doctorates, they are under-represented on the faculty. Women earn 66.1 percent of the doctorates awarded in psychology, but hold only 45.4 percent of the assistant professor jobs. In the biological sciences, 44.7 percent of the PhD's between 1993 and 2002 were awarded to women; in 2002, women accounted

[13] *Id.* at 24-25.

[14] *Id.* at 28.

for only 30.2 percent of the assistant professors in the field.[15]

- In 1999-2000, 51 percent of female faculty members at all institutions had tenure, compared to 69 percent of the men. Those percentages have remained essentially unchanged for two decades.[16]

- In addition to making up a minority of the teaching faculty at colleges and universities, women generally have remained in the lower faculty ranks. In 1998, women were 53.5 percent of lecturers, 50.6 percent of instructors, 45 percent of assistant professors, 35.8 percent of associate professors, and only 20.8 percent of full professors. The average salary for women full professors for academic year 1998-99 was $64,236, just 88 percent of the $73,260 their male counterparts earned.[17]

- Women faculty in the sciences teach more often than their male counterparts and are given less opportunity to focus on their scientific research.[18]

[15] Donna J. Nelson & Diana C. Rogers, *A National Analysis of Diversity in Science and Engineering Faculties at Research Universities*, available at http://www.now.org/issues/diverse/diversity_report.pdf.

[16] NCES Digest, tbl. 242, available at http://www.nces.ed.gov/pubs2003/2003060.pdf.

[17] Report Card on Gender Equity at 28-29.

[18] GAO Report at 3.

Sexual Misconduct and Harassment

- Six in 10 of all students (both girls and boys) experience physical sexual harassment at some point in their school lives, one-third often or occasionally. Girls are more likely than boys to experience harassment.[19]

- Sexual misconduct, including abuse and harassment, is also all too common. Studies suggest that almost 10 percent of all students are subject to sexual misconduct by school employees between kindergarten and twelfth grade.[20]

In observance of Title IX's thirtieth anniversary in June 2002, the National Coalition for Women and Girls in Education (formed by over 50 organizations) issued a "Report Card on Gender Equity" reviewing the nation's progress in implementing the statute. Overall, the progress reports were decisively mediocre, with "substantial progress" being found in only two areas (Access to Higher Education and Math and Science), "some progress" being found in six areas (Athletics, Employment, Learning Environment, Sexual Harassment, Standardized Testing, and Treatment of Pregnant and Parenting Students), and "little progress" being found in two areas (Career Education and Technology). The report concludes that "despite the progress, barriers remain and more must be done to make Title IX the vehicle for equity it was intended to be."[21]

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19 Report Card on Gender Equity at 41.

20 U.S. Department of Education, Office of the Under Secretary, Policy and Program Studies Service, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, at 18-20 (2004).

21 Report Card on Gender Equity at 1.

B. Women Are at a Heightened Risk of Retaliation for Reporting Discrimination.

As the statistics above indicate, despite considerable improvements since 1972, women are still more likely to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in their education programs and activities. That inequitable standing is certainly troubling in itself. But an even more insidious concern is that having less authority, less prestige, and less status makes one more vulnerable to retaliation and reprisal for reporting or questioning that gender discrimination. Absent protection from retaliation, the voices that are most likely to be silenced are those most likely to experience and witness what the statute seeks to prevent.

While there do not appear to be statistical data specific to Title IX enforcement, one cannot avoid the unfortunate truth that those who voice complaints against discrimination are at a real and substantial risk of reprisal. In a report issued last month on "Women's Participation in the Sciences," the General Accounting Office concluded that federal agencies need to do more to ensure compliance with Title IX. Among other things, the report notes that students and faculty interviewed "suggested they would be unlikely to file a complaint for fear of retribution from supervisors or colleagues." Specifically, women faculty members reported that "although they perceive that discrimination exists in their department, filing a complaint could hinder their ability to attain tenure." *Id.*[22]

A survey of the relevant case law illustrates that the concerns expressed to the GAO investigators are not phantom fears, and that reprisal discrimination can and does occur when women speak out against potential violations of Title

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22 GAO, *Women's Participation in the Sciences*, at 11.

IX. *See, e.g., LeGoff v. Trustees of Boston Univ.*, 23 F. Supp. 2d 120 (D. Mass. 1998) (court found that coach stated a *prima facie* claim for retaliation based on allegations that she was told she would be terminated from her employment if she complained that she was paid less than her male counterparts for coaching two sports, while male coaches only had to coach one sport); *Nelson v. Univ. of Maine Sys.*, 944 F. Supp. 44 (D. Maine 1996) (awarding attorney fees to plaintiff after a jury found that the University retaliated against him in violation of Title IX for aiding students who were discriminated against on the basis of gender); *Litman v. George Mason Univ.*, 92 Fed. Appx. 41, No. 01-2128, 2004 WL 345758, at *1 (4th Cir. Feb. 25, 2004), *petition for cert. filed June 1, 2004*, No. 03-1628 (reversing district court's dismissal of retaliation claim in which student alleged that university wrongfully imposed academic sanctions against her and dismissed her from the university when she complained of sexual harassment by her professor). Even well-placed women in positions of authority find that they are not immune from retaliation when they complain of gender inequities in educational programs and activities. *See, e.g., Atkinson v. Lafayette Coll.*, No. 01-CV-2141, 2002 WL 123449 (E.D. Pa. Jan. 29, 2002), *appeal pending*, (Director of Athletics claimed her employment was terminated because she questioned gender inequity in the athletics budget; the court found that there was no cause of action for retaliation under Title IX).

It is evident that women complaining of sex discrimination are all too frequent targets of retaliatory actions, and studies of retaliation against women in other contexts illustrate the likely magnitude of the problem under Title IX. A recent report by *amicus* National Partnership for Women & Families reviewing charges filed with the Equal Employment Opportunity Commission (EEOC) concluded that "retaliation remains a serious and sizeable problem" and that "[w]omen in particular seem to be targets of alleged

retaliatory actions by employers."[23] The report called for closer scrutiny and analysis by the EEOC to determine whether women are perceived as "easy targets" or whether there may be "unique features of the work environments of many women workers that tolerate or even promote" retaliatory conduct. *See* National Partnership for Women & Families, *Women at Work: Looking Behind the Numbers, 40 Years After the Civil Rights Act of 1964*, at 11-12 (July 2004). A study of female "whistleblowers" who alleged sex discrimination on the job found that in spite of "explicit legal protection from retaliation for complainants in sex discrimination cases, over 40% of the respondents cited one or more instances of retaliation." Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, Work and Occupations, 3-28; 12-14 Feb. 1983, Vol. 10, No. 1.

Women reporting sexual harassment are particularly vulnerable to retaliatory actions. A study of state employees found that 62 percent of the respondent employees indicated that they suffered retaliation after reporting harassment. Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. Cal. L. Rev. 307, 375 (2004) (citing Louise F. Fitzgerald and Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. of Social Issues 117, 122 (1995)). Fear of retaliation is frequently cited as the primary explanation for the failure of

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[23] The data revealed that women filed almost 60 percent more retaliation charges than men. In fiscal year 2003, women filed 12,512 charges with the EEOC while men filed 7,813 charges. This proportion has remained fairly consistent over time. *See* National Partnership for Women & Families, *Women at Work: Looking Behind the Numbers, 40 Years After the Civil Rights Act of 1964*, at 12 (July 2004).

sexual harassment victims to report such behavior.[24] One study found that one third of the persons who filed formal harassment claims said that "it made things worse," while still another study found that reporting misconduct was associated with more negative outcomes of every type (job, psychological, health), even after controlling for the severity of the harassment.[25]

Because retaliation is so prevalent, Title IX cannot be enforced effectively without extending protection to those who report violations. And because there is evidence that retaliation may be often directed at women, barring a cause of action for retaliation may disproportionately harm women who face gender discrimination in education, thereby further undermining the goals of Title IX.

II. PROTECTION AGAINST RETALIATION IS ESSENTIAL TO EFFECTIVE ENFORCEMENT OF TITLE IX.

Although protection from retaliation is not explicitly provided for in the statute (any more than protection from any other specific type of discrimination is explicitly mentioned), the right to be free from discrimination must necessarily include protection from retaliation for those who seek to invoke Title IX's anti-discrimination guarantees. Retaliation exacerbates and perpetuates existing discrimination, frustrates the remedial goals of Title IX, and discourages informal resolution of statutory violations.

Failure to include retaliation within the scope of Title IX not only fails to remedy existing practices that violate the Title IX guarantee, but it also invites new, more insidious harms. If the individual retaliated against has already been subject to discrimination, any reprisal actions likely will increase the negative effects already suffered, be they economic, physical, or psychological. *See, e.g., Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations,* 82 Journal of Applied Psychology 401-15 (1997).

Moreover, unredressed retaliatory action sends the message that discrimination is institutionally tolerated and condoned. That message, in turn, may itself promote additional discriminatory or harassing acts and will discourage further action to combat it. *See* Faye J. Crosby, *Why Complain?*, 49(1) J. of Soc. Issues 169, 174 (1993) ("The organizational climate towards discrimination and retaliation is thus powerfully predictive of whether targets of discrimination choose to report it.").

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[24] *See, e.g.*, Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Relation Protection: Why Everyone, Including the Employer, Loses*, 5 Employee Rights & Employee Policy J. 549, 586-87 (2001) (noting that "only between 12 and 20 percent of harassed employees ever report the harassing conduct" and citing studies demonstrating that "nearly 70 percent of female employees questioned about their failure to report sexual harassment in the workplace considered the potential for retaliation to be a moderate or strong influence on their decision").

[25] *See, e.g.*, Deborah Erdos Knapp, et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework,* Academy of Management Review Vol. 22, No. 3 (July 1, 1997); Louise F. Fitzgerald and Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment,* 51 J. of Social Issues 117, 126-37 (1995); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping With Sexual Harassment,* 42 J. of Vocational Behavior 28, 37-39 (1993). These and other studies are collected and reviewed in a forthcoming article by Deborah L. Brake, Associate Professor, University of Pittsburgh School of Law, tentatively entitled "Reporting Discrimination and the Dynamics of Retaliation" (work in progress).

As the Court has recognized in other contexts, freedom from retribution for reporting discrimination is part and parcel of the statutory guarantee. *Cf. Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) (construing the anti-discrimination provisions of 42 U.S.C. § 1982 to prohibit retaliation, holding that if plaintiff were "punished for trying to vindicate the rights of minorities protected by § 1982 . . . . Such a sanction would give impetus to the perpetuation of racial restrictions on property."); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that, even though state employee has no right to employment, the state could not simply fire him for criticizing his employer because "[t]his would allow the government to 'produce a result which [it] could not command directly.'") (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Construing the Title IX private right of action as stopping short of protection against reprisal is not faithful to the statute and seriously undercuts the objective of protecting individuals from discrimination. If a victim of or witness to discrimination faces retaliation without recourse for reporting a violation of Title IX, the complainant likely will simply stay quiet. *See supra* notes 23 and 24 and accompanying text. That result directly sabotages the statutory purpose, because it creates conditions that support continued discrimination, allowing federal funds to continue to support the institution engaging in discriminatory conduct. *See Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (describing the twin goals of Title IX as "avoid[ing] the use of federal resources to support discriminatory practices . . . and provid[ing] individual citizens effective protection against those practices.").

The Court's emphasis on "notice" to school officials in its cases involving Title IX sexual harassment claims underscores the gross unfairness of reading the statute to exclude protection against retaliation. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), the Court held that Title IX provides no damages remedy in teacher-student harassment cases unless a school official who

has authority to institute corrective measures has "actual knowledge of discrimination in the recipient's programs and fails adequately to respond." In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court applied that same standard to student-on-student harassment, holding that a recipient of federal funds could be held liable for damages under Title IX where it has deliberately failed to respond to "known acts of peer sexual harassment." *Id.* at 649. In requiring that institutions have actual notice of harassment before they can be subject to a formal action for damages, the Court recognized that it was imposing a "high standard" on potential litigants. *Davis*, 526 U.S. at 643 (citing *Gebser*, 524 U.S. at 290-91). That standard would become virtually insurmountable if the institution were free to retaliate against individuals who act to put it on notice of harassment. It would be counterproductive, to say the least, to construe the statute to apply when the recipient either attempts to fix the problem or, once put on notice, does nothing (*i.e.*, remains deliberately indifferent) but to have no effect when the institution punishes the notice-giver for daring to report the harassing conduct.

Even where "actual notice" is not a formal requirement of bringing suit, notice to school and university officials remains the most efficient and effective means of achieving compliance with Title IX. And in the thirty years since Title IX was implemented, the majority of complaints have been investigated and resolved internally, without any need for agency proceedings or judicial enforcement. *See* Bernice Sandler, Address at the American Federation of Teachers National Convention (July 14, 2004) ("Many of the changes that occur as a result of Title IX . . . did not happen by lawsuits. They happen because of people like you who thought that these [changes] were worth fighting for and told the powers that be that something was unfair.").

In the Title VII context, courts have construed the anti-retaliation provision to be a "crucial part of Title VII's

administrative machinery both because it protects employees . . . and it encourages informal resolution of alleged instances of discrimination . . . ." *LaVigna v. WABC Television, Inc.*, 159 F.R.D. 432, 435 (S.D.N.Y. 1995); *accord Deravin v. Kerik*, 335 F.3d 195, 204 (2d Cir. 2003); *see also Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (rejecting a narrow application of Title VII anti-retaliation provision because it would "tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances.").

Although there are significant differences between Title VII and Title IX, the anti-discrimination goals of both are served by prompt, informal resolution of violations. *See Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 254 (5th Cir. 1997) (internal citation omitted) ("[T]he implication of a private right of action for retaliation would serve the dual purposes of Title IX, by creating an incentive for individuals to expose violations of title IX and by protecting such whistleblowers from retaliation."). This informal resolution, however, depends on the willingness of individuals to report violations of Title IX. Protecting those who provide such notice therefore is essential to ensuring that schools and universities continue to have the opportunity to correct violations of Title IX without the need for formal action.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of petitioner, *amici* respectfully urge that the judgment of the Court of Appeals for the Eleventh Circuit be reversed.

Respectfully submitted,

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INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

Founded in 1971, the *National Partnership for Women & Families*, formerly known as the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, access to quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of anti-discrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and federal circuit courts of appeals to advance women's opportunities in education.

9to5, National Association of Working Women (9to5), founded in 1973, is a membership grassroots, non-profit organization that works to strengthen women's ability to achieve economic justice. 9to5 does this through campaigns focused on improving work/family policies, reducing poverty and increasing income supports, raising standards for the temp industry and eliminating all forms of discrimination. Since 1985, 9to5 has been conducting trainings in the public and private sectors to prevent sexual harassment and other forms of sex discrimination and increase awareness of what they are and are not. 9to5 has published and updated the 9to5 Guide to Combating Sexual Harassment. 9to5 is headquartered in Milwaukee, WI with other staffed chapters in Denver, CO and Atlanta, GA. There are an additional 15 volunteer chapters throughout the country.

Alabama NOW is the state affiliate of the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 450 chapters in all 50 States and the District of

Columbia. Alabama NOW's goals include achieving equal education opportunities for women and girls. To that end, Alabama NOW advocates for vigorous enforcement of Title IX.

Founded in 1881, the *American Association of University Women* (AAUW) has fought for over a century for equity in education for women and girls. Crucial in the grassroots struggle to pass Title IX in 1972, AAUW and its membership of over 100,000 has lobbied at all levels of government to preserve the integrity and spirit of Title IX's standards and regulations. AAUW, and its Alabama Chapter, strongly believe that protection from retaliation is a central component for the fair and effective enforcement of any civil rights law.

The *American Association of University Women Legal Advocacy Fund* (LAF) is a nonprofit organization that assists individuals challenging sex discrimination in higher education. Since 1981, LAF has helped students, faculty, staff and administrators challenge various discriminatory practices at colleges and universities, such as sexual harassment, denial of tenure and promotion, pay inequity, retaliation, and inequities in athletics programs.

The *American Medical Women's Association* (AMWA) is an organization of 10,000 women physicians and medical students dedicated to serving as the unique voice for women's health and the advancement of women in medicine. AMWA was founded in 1915, at a time when women physicians were an under-represented minority. As women in medicine increase in numbers, new problems and issues arise that were not anticipated. AMWA has been and continues to be in the forefront of leadership in addressing these issues.

The *Business and Professional Women/USA* (BPW/USA), founded in 1919, promotes equity for all women in the workplace through advocacy, education and information. With 1,500 local organizations across the

country and members in every congressional district, BPW/USA is the leading advocate for millions of workingwomen on work-life balance and workplace equity issues. BPW/USA supports Title IX's prohibition of discrimination on the basis of sex in any education program or activity receiving federal financial assistance.

The *California Women's Law Center* (CWLC) is a private, non-profit advocacy and support center that works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic, and political constraints. CWLC's issue priority areas are sex discrimination, violence against women, women's health, race and gender, exploitation of women, and women's economic security. CWLC has expertise in the area of sex discrimination in education and, in particular, Title IX's prohibition against discrimination in school athletic programs. CWLC litigates, advocates and educates the community, advises the legislature, and joins as amicus in other cases related to this issue which is so crucial to the lives of women and girls.

The *Coalition of Labor Women* (CLUW) is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. For more than 20 years, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its 75 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as amicus curiae in numerous legal cases involving issues of gender discrimination and pay equity.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. For the past 30 years, CWEALF has provided legal information and conducted public policy and advocacy to ensure the spirit of Title IX is implemented and enforced in educational and employment opportunities.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). ERA has also appeared as *amicus curiae* in numerous cases before this Court, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Faragher v. City of Boca Raton*, 522 U.S. 1105 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Girls Incorporated, established in 1945, is a nonprofit youth organization that inspires all girls to be strong, smart, and bold. Through its affiliates across the country, Girls Inc. provides research-based afterschool and in-school programs, including sports programs, that empower girls to reach their full potential. Through its national advocacy, Girls Inc. works to protect Title IX and advance girls' rights in such areas as education and health. Girls Inc. serves girls ages 6-18 in over and is headquartered in New York City.

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish

membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women in the Unites States. Hadassah is strongly committed to supporting Title IX as a critical element in removing barriers to women's participation in society and promoting women's health.

The *League of Women Voters of the United States* is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League is organized in nearly a thousand communities and in every state, with more than 120,000 members and supporters nationwide. The League was founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States. Since its inception, the League has fought to ensure that women can take their full and rightful place in American society.

Legal Momentum (formerly NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights. Legal Momentum, then known as NOW Legal Defense, pioneered the implementation of Title IX with PEER, its nationwide Project on Equal Education Rights, from 1974-1992. It was co-counsel in *Doe v. Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX, and has appeared as *amicus curiae* in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

The *National Asian Pacific American Women's Forum* (NAPAWF) is a national, multi-issue advocacy organization founded in 1996 committed to forging a grassroots movement for social and economic justice and the political empowerment of Asian/Pacific Islander women and girls. With members across the country, NAPAWF seeks to educate and bring awareness to Title IX, the importance of equal educational and employment opportunities, and its implications for the Asian/Pacific Islander community.

The *National Association of Social Workers* ("NASW") is the largest organization of professional social workers in the world. The Alabama Chapter of NASW represents twelve hundred members. NASW's mission is to promote the quality and effectiveness of social work practice to further the broad purposes of improving society, and to provide high quality social work services in all communities. NASW publishes scholarly reference materials, four quarterly professional journals, and comprehensive research abstracts. NASW's members are highly trained and experienced social workers who provide professional services to individuals, families, and communities in a variety of settings including schools. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women.

The *National Association of Women Lawyers*, headquartered in Chicago, is the oldest women's bar association in North America. Founded in 1899, the Association promotes the interests of women and families, as well as women in the profession. The Association has filed as *amicus curiae* in the U.S. Supreme Court as well as the highest courts of many states. The Association has a strong interest in protecting the legal rights of women and girls to equal funding and equal access to athletic facilities, training,

and equipment, guaranteed by Title IX. The Association also has an interest in defending these rights by ensuring that individuals who work to protect and advance rights guaranteed by Title IX may, in appropriate cases, seek redress for reprisal discrimination.

The *National Council of Jewish Women* (NCJW) is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide. NCJW was actively involved in passage of the Title IX program, and NCJW's National Resolutions support "the enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all."

The *National Organization for Women* (NOW) Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States. Since its inception, NOW Foundation's goals have included achieving equal educational opportunities for women and girls

The *National PTA* is a non-profit organization of six million members dedicated to advocating for all children to receive a quality education. The organization has a long history of promoting gender and racial equality in schools, and has supported a number of legislative initiatives and court cases supporting this goal. The organization also promotes continued respect for, and expansion of, civil rights and requires they be defended whenever threatened.

The *Northwest Women's Law Center* (NWLC) is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information

and referral services. Since its founding in 1978, NWLC has been involved in both litigation and legislation aimed at ending all forms of discrimination against women. As part of that effort, NWLC has been dedicated to protecting and ensuring women's rights to equality in education and athletics. Toward that end, NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country.

Wider Opportunities for Women (WOW) is a non-profit organization established in 1964 that works nationally and in its home community of Washington, D.C. to achieve economic independence and equality of opportunity for women and girls. WOW's programs focus on technical and non-traditional skills, welfare to work transition, career development and family economic self-sufficiency. A woman's economic security very much depends on her ability to obtain an education free of gender bias.

The *Women's Business Development Center* is a nonprofit organization that provides programs and services to enhance women's economic empowerment through business ownership and advocacy. Effective Title IX enforcement and the equal participation of women and girls in educational activities are essential to women's economic empowerment.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts.

The *Women's Law Center of Maryland, Inc.* is a non-profit organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, workplace issues and family law. Established in 1971, the Women's Law Center achieves its mission

through impact legislation, research, direct legal services, legislative initiatives and public education.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education, and individual counseling. The WLP has worked throughout its history to eliminate sex discrimination in athletics and education under Title IX.

The *Women's Research & Education Institute* (WREI) was founded in 1977 to provide nonpartisan data and policy analysis to the women of Congress. Now an independent institution, WREI's agend is still based on arming the women and men of Congress (along with state and local legislators, advocates, the press and public) with the timely, reliable information they need to "make the case for women in America." Title IX has always been a priority issue at WREI.

Deborah Brake is an Associate Professor of Law at the University of Pittsburgh School of Law, where she teaches courses on Title IX and Sex Discrimination. She has written numerous law review articles on Title IX and is a frequent speaker and lecturer on issues related to Title IX.

Eleanor Linn is Senior Associate Director of the Programs for Educational Opportunity, an Equity Assistance Center in the School of Education at the University of Michigan. She has twenty-two years of experience working in gender equity in education and technical assistance to schools regarding Title IX.

Hedy Ratner is a member of the Illinois Governor's Commission on the Status of Women, the Co-Chair of the Mayor Daley's Women's Health Task Force, the Author of the

Urban Women's Health Agenda, and Co-President of the Women's Business Development Center.

Bernice Resnick Sandler played a major role in the development and passage of Title IX and other laws prohibiting sex discrimination in education. She has worked with educational institutions concerning equity and sexual harassment issues for over 30 years and has written over 100 articles and four books in the field. She has also served as an expert witness in discrimination and sexual harassment cases.